

# Calendar No. 1370

89TH CONGRESS }  
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SENATE

{ REPORT  
No. 1406

## UNIFORM CIVIL APPELLATE RULES

JULY 22, 1906.—Ordered to be printed

Mr. TYDINGS, from the Committee on the Judiciary, submitted  
the following

### REPORT

[To accompany S. 3254]

The Committee on the Judiciary, to which was referred the bill (S. 3254) to amend sections 2072 and 2112 of title 28, United States Code, with respect to the scope of the Federal Rules of Civil Procedure and to repeal inconsistent legislation, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

### PURPOSE

The purpose of the proposed legislation is to authorize the Supreme Court to extend the scope of the Federal Rules of Civil Procedure to encompass practice and procedure in civil actions conducted before the U.S. courts of appeals. The bill also codifies in one section the rule-making power with respect to civil rules, admiralty rules and appeals from the Tax Court of the United States. Rules for appeals of agency decisions will also be promulgated under the amended 28 U.S.C. section 2072.

### STATEMENT

Current statutory law provides that the Supreme Court has the power to prescribe rules for the trial and appeal of criminal cases, 18 U.S.C., sections 3771-3772; the trial and appeal of admiralty and maritime cases, 28 U.S.C., section 2073, and the review of decisions of the Tax Court of the United States, 28 U.S.C., section 2074. However, the statute which provides for the promulgations of civil rules of procedure, 28 U.S.C., section 2072, extends only to the practice and procedure of the district courts of the United States, making no provision for governing the practice and procedure in the courts of appeals.

Due to this omission in the existing statutory pattern, the Rules of Civil Procedure cover only the preliminary procedure on appeal from the filing of the notice of appeal in the district court to the docketing of the appeal and the filing of the record in the court of appeals. Appellate procedure beyond that point is controlled by the individual rules of the courts of appeals to which the particular appeal is taken. There are 11 courts of appeals and consequently 11 different sets of rules governing appellate proceedings in the Federal system.

The Judicial Conference of the United States has considered the problem of the diversity in appellate procedure, and its Advisory Committee on Appellate Rules has been drafting a set of uniform rules. In March 1964 the Conference reported:

The Conference considered the question as to the manner in which a set of appellate rules, when finally perfected, can be promulgated. Upon recommendation of the [Advisory] Committee, the Conference approved a draft bill, submitted by the Committee, which would amend 28 U.S.C., section 2072, to enlarge the present civil rulemaking authority of the Supreme Court of the United States to include appellate rules. The bill, as drawn, would extend the civil rulemaking power of the Supreme Court to include bankruptcy proceedings and proceedings for the review and enforcement of orders of administrative agencies. The bill would also consolidate the present admiralty rulemaking power with that for all other civil actions. (Annual Report of the Director of the Administrative Office of the U.S. Courts, 1964, at p. 22.)

Judicial Conference of the United States has informed the committee that it "urgently" recommends the passage of S. 3254.

The bill also has the effect of placing in one statutory section substantially all of the rulemaking authority with respect to civil proceedings. The bill will not alter the provisions of the third paragraph of section 2072 of title 28, United States Code, and all amendments to existing Federal Rules of Civil Procedure and any new rules proposed under the authority of S. 3254 would not take effect until they had been reported to Congress at or after the beginning of a regular session but not later than May 1 and only after the expiration of 90 days after they had been so reported.

Under these provisions it would be necessary for Congress to enact a law within the 90-day period to prevent a proposed rule from taking effect. Even though section 2072 of title 28 provides that rules must not affect substantive rights, as a practical matter little opportunity is available for Congress to act upon a proposed rule that might infringe upon this requirement.

This bill follows a procedure for the adoption of appellate rules that parallels the procedures under existing law for the promulgation of the Federal Rules of Civil and Criminal Procedure. In following this procedure, however, it is not necessarily the intention of the committee to indicate renewed approval of this manner of promulgating rules of court procedure. Members of the Supreme Court and of this committee have expressed reservations about the way in which rules of court procedure are adopted, and about the lack of opportunity for

congressional review, and have suggested that the matter deserves careful reexamination.

Federal practice and procedure now has the benefit of uniform appellate rules for the prosecution of every type of appeal except a civil appeal. This bill, if enacted, will extend this benefit to civil appeals as well.

In view of these considerations, the committee recommends that the bill, S. 3254, be considered favorably.

Attached hereto and made a part hereof is a letter in support of the bill from the Administrative Office of the U.S. Courts to the Honorable James O. Eastland, U.S. Senator, chairman of the Committee on the Judiciary, dated April 29, 1966.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,  
*Washington, D.C., April 29, 1966.*

HON. JAMES O. EASTLAND,  
*Chairman, Senate Judiciary Committee,*  
*U.S. Senate, Washington, D.C.*

DEAR SENATOR EASTLAND: This is in response to your letter of April 25, 1966, transmitting for study and report S. 3254, a bill to amend sections 2072 and 2112 of title 28, United States Code, with respect to the scope of the Federal Rules of Civil Procedure and to repeal inconsistent legislation.

This bill carries out a recommendation of the Judicial Conference of the United States to achieve what the Judicial Conference regards as an urgent need for more uniformity of practice among the courts of appeals. The bill would authorize the Supreme Court to extend the scope of the Federal Rules of Civil Procedure to include the entire course of the appellate procedure in civil actions in U.S. courts of appeals.

At the present time the Rules of Civil Procedure cover only the preliminary procedure on appeal from the filing of the notice of appeal in the district court to the docketing of the appeal and the filing of the record in the court of appeals. The appellate procedure after that point is governed by the individual rules of the court of appeals to which the particular appeal is taken. The procedure throughout the Federal court system, therefore, is uniform up to the point of filing the record on appeal but after that point becomes widely diverse in the 11 circuits. This largely unnecessary diversity in the details of the procedural rules of the 11 courts of appeals is the cause of much difficulty, confusion and uncertainty for lawyers, both government and private, a great many of whom are called upon to prosecute appeals in the various circuits.

The Judicial Conference is of the view that a greater uniformity of practice can be accomplished and that the best method of achieving this is to extend the scope of the Federal Rules of Civil Procedure as proposed in S. 2354. The problem and the need for uniformity are the same with respect to the procedure for the review and enforcement of orders of administrative agencies both in the district courts and in the courts of appeals. Since these proceedings are basically civil in nature, the Judicial Conference believes that the procedure with respect to them also can appropriately be provided by authorizing

the scope of the Rules of Federal Civil Procedure to be extended to cover them. S. 3254 would also accomplish this purpose.

Since admiralty cases are essentially civil actions or proceedings, they are likewise included in S. 3254 as part of section 2072 of title 28, thus including in that one section substantially the entire rulemaking authority with respect to civil proceedings. This will make it possible to eliminate the entire section 2073 dealing only with admiralty rules from title 28, United States Code. The enactment of this bill, which is urgently recommended by the Judicial Conference, will complete the rulemaking authority of the Supreme Court with respect to procedure in the courts of appeals.

The bill does not in any way affect the requirement of the third paragraph of section 2072 of title 28, United States Code, that all amendments to the existing Federal Rules of Civil Procedure and all new rules which may be proposed under the authority which S. 2354 if enacted, would grant shall not take effect until they have been reported to the Congress at or after the beginning of a regular session but not later than May 1 and only after the expiration of 90 days after they have been reported.

Sincerely yours,

WILLIAM E. FOLEY,  
Deputy Director.

#### CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

#### TITLE 28, UNITED STATES CODE

##### § 2072. **[Rules of civil procedure for district courts.]** *Rules of civil procedure.*

**[The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.]**

*The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.*

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

**[§ 2073. Admiralty rules for district courts.**

**[The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the district courts of the United States and all courts exercising admiralty jurisdiction in the Territories and Possessions of the United States.**

**[Such rules shall not abridge or modify any substantive right.**

**[Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.**

**[All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.]**

**[§ 2074. Rules for review of decisions of the Tax Court of the United States.**

**[The Supreme Court shall have the power to prescribe, and from time to time amend, uniform rules for the filing of petitions or notices of appeal, the preparation of records, and the practice, forms, and procedure in the several United States Courts of Appeals in proceedings for review of decisions of the Tax Court of the United States.**

**[Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.**

**[Such rules shall not take effect until they shall have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.]**

**§ 2112. Record on review and enforcement of agency orders.**

**(a)****[The several courts of appeals shall have power to adopt, with the approval of the Judicial Conference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers, to the extent that the applicable statute does not specifically prescribe such time or manner of filing or contents of the record.]** *The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all*

such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as [the said rules of the court of appeals] *the rules prescribed under the authority of section 2072 of this title* may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with [the rules of such court] *the rules prescribed under the authority of section 2072 of this title* designate to be included therein, or (3) as the court upon motion of a party or, after a pre-hearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

**ACT OF DECEMBER 29, 1950 (CH. 1189, 64 STAT. 1132)**

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**[SEC. 11. The several courts of appeals shall adopt and promulgate rules governing the practice and procedure, including prehearing conference procedure, in proceedings to review orders under this Act: *Provided, however,* That such rules shall be approved by the Judicial Conference of the United States.] \* \* \***

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